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DEVELOPMENT & COMMERCIAL BANK BHD.

v.

UNI-COMMERCIAL SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR

ZAKARIA YATIM J

b

[CIVIL SUIT NO. C3-23-4424-86]

3 MAY 1989

CIVIL PROCEDURE: *Application for final judgment - Unconditional leave to defend - Appeal to Judge - Whether plaintiff waived right to take legal action - Guarantors - Notice of demand - Indulgence clause in guarantee.*

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The plaintiff bank applied to enter judgment against the defendants. The first defendant was the principal borrower and the other defendants stood as guarantors. The Senior Assistant Registrar refused to enter judgment and granted the defendants unconditional leave to defend.

The plaintiff bank appealed against the Registrar's order to the Judge in chambers. As regards the principal borrower, the issues were as follows:

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(i) when the plaintiff should have commenced action.

(ii) whether the plaintiff had waived their right to take legal action.

As regards the guarantors, the issue was whether their liability had arisen.

Held:

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[1] The issues raised by the principal borrower was said to be triable.

[2] By virtue of the guarantee, the guarantors had agreed to pay on demand and that any indulgence given to the principal borrower will not affect their liability. As such, the guarantors had no defence to the claim.

[Plaintiffs appeal against the first defendant dismissed. Appeal against the other defendants allowed.]

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For the plaintiff - L.T. Rasa-Ratnam; M/s Skrine & Company

For the defendants - Joseph Yeo; M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

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Zakaria Yatim J:

This was an appeal against the decision of the Senior Assistant Registrar given on 30 March 1988 refusing to grant the plaintiff's application to enter judgment against the defendants in the sum of RM298,068.14 together with interest from 30 July 1987 to the date of final judgment and costs and against the order granting the defendants unconditional leave to defend the action.

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The plaintiff's application was for an order that judgment be entered for the plaintiff against the defendants in the sum of RM298,068.14 as at 29 July 1987 together with interest on the sum of RM165,042.37 at the rate of 16.25% per annum from 30 July 1987 to the date of final payment and on the sum of RM94,709.07 at the rate of 13.25% per annum on monthly rests on the amount within the sanctioned limit of RM100,000 and at the rate of 18% per annum on monthly rests on the amount exceeding the sanctioned limit of RM100,000 from 30 July

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1987, to the date of final payment and costs. Alternatively the plaintiff applied for an order that the defence of the defendants be struck out and judgment be entered in favour of the plaintiff. **a**

The plaintiff is a bank. The first defendant is a private limited company incorporated in Malaysia with its registered office at Wisma SM1, No. 6, Lorong P. Ramlee, Kuala Lumpur, and was at all material times a customer of the plaintiff in respect of banking facilities granted to the first defendant. The banking facilities were overdraft facility and trust receipt facility. The other defendants were guarantors, who by letters of guarantee agreed to pay on demand all sums owing from the first defendant to the plaintiff. **b**

Mr. Yeoh, Counsel for the defendants submitted that the claim against the first defendant was premature. According to him the facilities were payable on demand. A demand letter was sent to the first defendant on 13 October 1986. Subsequently on 19 November 1986 the plaintiff wrote to the first defendant agreeing to a new arrangement for the repayment of the trust receipt. Mr. Yeoh submitted further that before there was any breach of the arrangement agreed upon in the 19 November letter the writ was filed by the plaintiff on 23 December 1986. Mr. Rasaratnam, Counsel for the plaintiff argued that in 19 November the plaintiff's letter did not agree to withhold legal proceedings against the first defendant. **c**

The question for the Court to consider was whether the plaintiff had a cause of action against the first defendant when the writ was filed on 23 December 1986. In their statement of claim the plaintiff averred that the first defendant was indebted to them in the sum of RM100,173.70 as at 10 November 1986 together with interest and a sum of RM323,775.97 as at 6 November 1986 together with interest. The plaintiff claimed that despite repeated requests and demands, the defendants had failed to pay the sums. According to the statement of claim the letters of demand were sent to the first defendant on 13 October 1986. **d**

It was not in dispute that the letter of demand dated 13 October was sent to the first defendant. The said letter of demand stated *inter alia*:

We act on behalf of Development and Commercial Bank Berhad. We have been instructed by our clients to demand from you, which we hereby do, the sum of RM434,578.33 being credit facilities with our clients ... **e**

Take notice that unless the aforesaid sum together with costs and interest are paid within seven (7) days of the date hereof, legal proceedings against you will be commenced without further reference to you ... **f**

There was no evidence that the plaintiff commenced legal proceedings against the first defendant after the expiry of the seven days as stated in the letter of demand. **g**

In their statement of defence, the defendants averred that the plaintiff had, by a letter dated 19 November 1986 agreed to grant the first defendant time to settle the outstanding sums. The defendants accordingly averred that the plaintiff's claim was premature and unsustainable. The letter dated 19 November 1986 was exhibited to the plaintiff's affidavit and to the defendant's affidavit. The text of the letter is reproduced below: **h**

Uni-Commercial Sdn. Bhd.
14th Floor, Menara SMI,
No. 6, Lorong P. Ramlee,
50250 Kuala Lumpur.

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a Dear Sirs,

Re: Credit Facilities

We refer to the above and are to advise that our bank has agreed to your request to repay the overdue trust receipt and overdraft as follows:

b (a) RM50,000 for November 1986 and thereafter RM25,000 each month for the settlement of trust receipt.

(b) Overdraft interest to be kept current monthly.

Kindly adhere to the above strictly.

Yours faithfully,

Development & Commercial Bank Bhd.

c Main Office.

Sgd/- Ling Voon Yoon
Manager.

d It seems to me that after the letter of demand was sent to the first defendant negotiations were held between the plaintiff and the first defendant as a result of which an agreement was reached and the terms of the agreement were stated in the letter quoted above. Obviously enough, after the above letter was written, the plaintiff filed their writ of summons on 23 December 1986 claiming debts due from the first defendant as at 19 November 1986 and as at 6 November 1986.

e The question that arose here was whether by the agreement contained in the letter of 19 November the plaintiff had agreed to withhold filing the said writ. There was no evidence of default *vis a vis* 19 November agreement until 11 February 1987. On that date the plaintiff wrote to the first defendant the following letter:

Uni-Commercial Sdn. Bhd.
14th Floor, Menara SMI,
No. 6, Lorong P. Ramlee,
50250 Kuala Lumpur.

f Dear Sir(s),

Re: Overdue Trust Receipts

The above refers.

g We regret to note that you have not adhered to your repayment schedule of RM25,000 each month.

You have only paid RM10,000 for the month of January 1987, the receipt of which is without prejudice to our right to proceed with further legal action to recover all the credit facilities granted to you.

h Kindly note that if you fail to adhere to the re-scheduled repayments by the end of February 1987 *viz* you will have to pay RM35,000 by the end of February 1987 and RM25,000 each month thereafter, we will proceed with further legal action to recover all the credit facilities granted, without further reference to you.

Yours faithfully,

Sgd/- Ling Voon Yoon (Mr).
Manager,

i Main Office.

A further question that arose here was whether the plaintiff should commence action against the first defendant after 11 February 1987 or whether the plaintiff had waived their right to take legal action for the time being in view of the 19 November agreement. In my opinion these are triable issues. For these reasons I dismissed the plaintiff's appeal against the first defendant. **a**

I shall now turn to the other defendants. According to Mr. Yeoh the guarantor's liability to pay did not arise yet. Mr. Rasaratnam, however, submitted that the guarantors liability to pay was not in any way affected by the plaintiff granting time to the first defendant to pay the debt. According to him the guarantors were not a party to the 19 November agreement. **b**

It will be noted that the plaintiff had written a letter of demand to the first defendant on 13 October 1986. The same letter of demand was sent to the guarantors on December 1986. As already stated on 19 November an agreement was reached between the plaintiff and the first defendant to reschedule payment of the loan. The question that arose here was whether the guarantors were liable to pay on receipt of the letter of demand or whether the 19 November agreement applied to them. According to the letters of guarantee the guarantors agreed to pay the plaintiff on demand made upon them. The first letter of guarantee was signed by the second defendant and the second letter of guarantee was signed by the third, fourth and fifth defendants. Both letters of guarantee were the same. I shall quote below the relevant clauses of the second letter of guarantee. Paragraph 1 stated *inter alia*: **c**

In consideration of Development and Commercial Bank Berhad ... making a continuing advances or otherwise giving credit or affording banking facilities and accommodation for any longer the bank may think fit to Uni-Commercial Sdn. Bhd. ... we the undersigned (the names of the third, fourth and fifth defendants) jointly and severally **guarantee payment on demand upon us** of all money and liabilities ... now ... owing or incurred to the bank for or by the customer ... (Emphasis added) **d**

Clause 1 of the letter of guarantee went on to state:

Provided that the total sum recoverable from us ... is limited to the sum of RM1,100,000 ... **owing or incurred to the bank as aforesaid at the date that demand** for the same is made by the bank. **e**
(Emphasis added). **f**

Clause 7(2) of the letter of guarantee provided:

The bank may at all material times without prejudice to this guarantee and without discharging or in any way affecting our liability hereunder and without notice to any of us ... grant to the customer or to any other person any time or indulgence ... **g**

In view of the provisions contained in the letters of guarantee and in the circumstances of the present case the second, third, fourth and fifth defendants had no defence to the claim. I accordingly allowed the appeal against them.

Also found at [1989] 2 CLJ 716

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